For the above reasons, it is clear to me the the witness referred to in s 134 is the person who is testifying at a trial or other judicial proceedings where the Evidence Act is applicable. There is a final consideration which puts this interpretation beyond doubt. Section 2(1) of the Evidence Act provides as follows:

> Parts I, II and III shall apply to all judicial proceedings in or before any court but *not to affidavits presented to any court* or officer nor to proceedings before an arbitrator. (Emphasis added)

Section 134 appears in Part III of the Act (comprising ss 103 to 168) which deal with, inter alia, evidence and witnesses. As the definition of 'evidence' in the Act does not include affidavits, it must follow that Part III is concerned with oral evidence only.

I am therefore of the view that s 134 of the Evidence Act has merely qualified the privilege against self-incrimination to the extent the witness gives oral testimony in judicial proceedings to which the Evidence Act is applicable.

In so far as the instant case is concerned, and whatever may be the effect of s 134 of the Evidence Act, s 2(1) thereof has the effect of invalidating the Anton Piller order contained in para 4 of the court order of 21 April 1988. Accordingly, the order must be discharged with costs.

Order discharged.

Solicitors: *Haridass Ho & Partners*; *Allen & Gledhill.*

Reported by *Terence Tan Bian Chye*

Peter Tham Wing Fai v Public Prosecutor

HIGH COURT (SINGAPORE) – MAGISTRATE'S APPEAL NO 324 OF 1988
CHAO HICK TIN JC
5 APRIL 1989

Criminal Procedure – Sentencing – Principles guiding appeal court in interfering with trial judge's sentence – Whether appellant should be subject to deterrent sentence – Whether sentence should run consecutively with prior sentence – Penal Code (Cap 224, 1985 Ed), ss 406 & 409 – Companies Act (Cap 50, 1985 Ed), s 157(1) – Criminal Procedure Code (Cap 68, 1985 Ed), s 234

The appellant was convicted by the district judge on a charge under s 406 of the Penal Code for criminal breach of trust. He was sentenced to a term of two years' imprisonment which was ordered to take effect from the expiry of the present eight-year term of imprisonment the appellant was serving for his earlier conviction on 36 forgery charges. The appellant appealed against sentence on the grounds that two years' imprisonment was manifestly excessive and that the trial judge did not exercise his discretion judiciously when he ordered the present sentence to begin only after the expiry of the current eight-year term. On the first ground, the appellant argued that the judge had taken into consideration the background facts set out in the statement of facts. Those facts it was said related to charges which had been withdrawn by the prosecution.

Held, allowing the appeal in part:

(1) An appellate court in considering an appeal on sentence should interfere if it is satisfied that the sentencing judge has made the wrong decision as to the proper factual basis for sentence, there has been an error on the part of the trial judge in appreciating the materials before him, the sentence was wrong in principle or the sentence imposed was manifestly excessive.

(2) Here, from the first two paragraphs of the grounds of decision, it was clear that the trial judge had allowed the other events surrounding the Pan-El and GIH (two companies with which the appellant was associated) to affect his decision as to the appropriate sentence to be imposed.

(3) It was equally clear that the judge was imposing a deterrent sentence. There was also no link between the present charge and the 36 charges of forgery that the appellant was convicted of and even if there was such a link, the appellant was already serving a deterrent sentence of eight years for these offences.

(4) To impose another deterrent sentence now on this charge would tantamount to making the appellant suffer double deterrent sentences arising out of basically the same matrix of facts.

(5) There were good mitigating factors in this case, namely, full restitution having been made, the appellant pleaded guilty to the charge, the prosecution's costs had been paid, a full and final settlement of all outstanding matters with the Pan-El group had also been affected. The prosecution also did not press for a deterrent sentence. The discount for a plea of guilty should be substantial.

(6) Bearing in mind all these, the sentence of two years' jail was manifestly excessive, although a fine would be quite inadequate. The prison term would be reduced to one year.

(7) Having regard to all the circumstances as a whole, there was more than an even chance that the trial judge might, considering the reasons which he gave when sentencing the appellant to the eight-year term, have ordered that this sentence should run consecutive to the eight-year term. It was not wrong of the judge to order that the present term should take effect only after the expiry of the eight-year term.

(8) The appeal was accordingly only allowed to the extent that the sentence was reduced to one-year imprisonment.

Cases referred to

1 *Peter Tham Wing Fai* v *PP* [1988] 2 MLJ 424 (refd)
2 *Tan Koon Swan* v *PP* [1987] 2 MLJ 129 (folld)
3 *Khoo Ban Hock* v *PP* [1988] 3 MLJ 22 (refd)
4 *Elsie Florence Carey Albert Ames* (1988) 26 Cr App Rep 133 (distd)

Legislation referred to

Companies Act (Cap 50, 1985 Ed) s 157(1)
Criminal Procedure Code (Cap 68, 1985 Ed) s 234
Penal Code (Cap 224, 1985 Ed) ss 406, 409

Denis Tan for the appellant.
Roy Neighbour (*Hamidul Haq* with him) for the respondent.

Cur Adv Vult

Chao Hick Tin JC: This is an appeal against sentence. The appellant was convicted by the learned district judge on a charge under s 406 of the Penal Code for criminal breach of trust ('CBT'). He was sentenced to a term of imprisonment of two years which was ordered to take effect from the expiry of the present eight-year term of imprisonment which he is now serving on his earlier conviction in October 1986 of 36 forgery charges.

Counsel for the appellant raised two main grounds of appeal:

(i) the sentence of two years' imprisonment is manifestly excessive; and

(ii) the learned district judge did not exercise his discretion judiciously when he ordered that the present sentence of two years should only begin to run after the expiry of his current eight-year term.

Under the first ground, it was argued by counsel for the appellant that the learned district judge erred in taking into consideration the background facts set out in the statement of facts. Counsel contended that those facts related to the charges concerning the forward contracts and those charges had been withdrawn by the prosecution. Counsel also complained that the district judge was wrong to assume that the reduction of the present charge (from one under s 409 to that of a simple CBT under s 406) was due in part to the fact that he had made full restitution and settlement of all outstanding matters with Pan-El and its subsidiaries and affiliates. Counsel further argued that the district judge was not justified in imposing a deterrent sentence.

The present charge is that the appellant dishonestly disposed of $260,000 of the Orchard Hotel Pte Ltd ('OHPL') in violation of s 157(1) of the Companies Act to enable one Teo Hock Seng to settle his outstanding debts with the Associated Asian Securities Pte Ltd ('AAS'), a stockbroking company in which the appellant was a director and a major shareholder. At the time of the offence the appellant was the chairman of OHPL and Teo Hock Seng was the general manager of the hotel. Previously the appellant was a remisier at AAS.

The statement of facts, which was admitted by the appellant, clearly described how the appellant acquired a controlling interest in the Pan-El and Growth Industrial Holdings Ltd ('GIH') groups of companies. The statement also went on to elaborate how the appellant used the funds of Pan-El and GIH to finance the clients of AAS. This was done by way of forward contracts. But there was nothing in the statement to link the present charge with either the 36 forgery charges upon which the appellant has been convicted and sentenced or the forward contracts arrangements indulged in by the appellant. What the statement disclosed was that there was a great deal of controversy between the appellant and Teo as to whether Teo in fact owed AAS the sums claimed. But on the charge as framed, it was clearly based on the assumption that the sum $260,000 was used to pay the debts owed by Teo to AAS.

From the first two paragraphs of the grounds of decision of the learned district judge it is clear that he had allowed the other events surrounding the Pan-El and GIH affairs, particularly the arrangements regarding the forward contracts, to affect his decision as to the appropriate sentence to be imposed. As I said, there was nothing in the statement that can reasonably be read to suggest that this charge had anything to do with the forgery charges or the forward contracts arrangements (in respect of which matters the charges were subsequently withdrawn by the prosecution). It seems to me that the district judge was influenced by matters unrelated to the present charge when he passed sentence.

Equally clear from the grounds of decision of the learned district judge was that in imposing a sentence of two years' imprisonment, he was imposing a deterrent sentence. His reasons were these:

> You held a position of trust and in that position you were able to and you did misuse the funds of the company. Public interest demands that a case like this be dealt with strictly in the hope that would-be offenders will be deterred.

Obviously in every case where a person is charged under s 406, there is an abuse of a position of trust. What makes this case special is that, like the 36 forgery charges, it was uncovered during the investigations into the Pan-El debacle. The charges relating to the deals on forward contracts had been withdrawn. I do not think anything adverse to the appellant can or should be drawn from that fact. It is also clear to me that there was no link between this charge and the 36 forgery charges. Even assuming that there was such a link, the appellant is already now serving a deterrent sentence totalling eight years for the forgery offences (see judgment of Chua J in *Peter Tham Wing Fai* v *PP*[1] at p 434 who affirmed the deterrent sentence imposed by the senior district judge). I am inclined to agree with counsel for the appellant that to impose another deterrent sentence now on this charge would tantamount to making the appellant suffer double deterrent sentences arising out of basically the same matrix of facts relating to the appellant's stockbroking business.

In *Tan Koon Swan* v *PP*[2] the Court of Appeal laid down the principles that govern an appellate court in considering an appeal on sentence. It held that an appellate court should interfere if it is satisfied that (i) the sentencing judge has made the wrong decision as to the proper factual basis for sentence; (ii) there has been an error on the part of the trial judge in appreciating the materials placed before him; (iii) the sentence was wrong in principle; or (iv) the sentence imposed was manifestly excessive.

In my view the learned district judge was wrong in taking into account materials which, though placed before him, had nothing to do with the charge. It seems to me that he had decided to impose a deterrent sentence because of factors extraneous to the charge.

There were good mitigating factors in this case, ie full restitution was made to OHPL; appellant had pleaded guilty to the charge; prosecution's costs had been paid; and a full and final settlement of all outstanding matters with Pan-El and its subsidiaries and affiliates had also been effected. Further, I note that the prosecution did not press for a deterrent sentence but left it to the court. In this regard I was reminded of the view expressed by the Court of Appeal in Brunei in *Khoo Ban Hock* v *PP*[3] that the discount for a plea of guilt should be substantial. Considering all these, I am of the view that a sentence of two years' imprisonment in the circumstances of the present case is manifestly excessive though I am also of the opinion that a fine would be quite inadequate. A custodial sentence is called for. I would accordingly reduce the prison term from two years' to one year.

Turning to the second ground of appeal, ie that the present term of imprisonment should run from the date of conviction rather than from the expiry of the eight-year imprisonment term which the appellant is now serving, s 234 of the Criminal Procedure Code provides that:–

> When a person who ... is undergoing a sentence of imprisonment is sentenced to imprisonment the latter sentence of imprisonment shall commence either immediately or at the expiration of the imprisonment to which he was previously sentenced as the court awarding the sentence directs.

This section clearly gives a discretion to the court. Of course, this discretion should be exercised judiciously.

In determining this question, counsel for the appellant urged me to place myself in the shoes of the senior district judge and consider whether, if this charge were dealt together with the earlier 36 charges on forgery, would the senior district judge have imposed this sentence to run consecutive to the eight-year term. Having regard to all the circumstances as a whole, I am satisfied that there is more than an even chance that the senior district judge might, considering the reasons which he gave when sentencing the appellant to the eight-year term, very well have ordered that this sentence should run consecutive to the eight-year term. The case *Elsie Florence Carey Albert Ames*[4] is clearly distinguishable. There the subsequent charge was similar to the earlier charge which is not so in our present case. In any event, looking at the facts of this case as well as those relating to the 36 forgery charges, I do not think it was wrong of the learned district judge to order that the present term should only take effect after the expiry of the eight-year term. Accordingly, I would not disturb the exercise of the district judge's discretion.

In the result this appeal is allowed to the extent that the sentence is reduced to one-year imprisonment. As ordered by the learned district judge, it shall take effect after the appellant has served his present term.

Order accordingly.

Solicitors: *Toh Tan & Partners.*

Reported by *Terence Tan Bian Chye*

Societe Generale v Good Property Land Development Pte Ltd (No 2)

HIGH COURT (SINGAPORE) – ORIGINATING SUMMONS NO 1151 OF 1988
CHAN SEK KEONG J
28 JANUARY 1989

Land Law – Statutory power of sale under Conveyancing and Law of Property Act – Whether applicable to unregistered mortgage of registered land under Land Titles Act – Conveyancing and Law of Property Act (Cap 61, 1985 Ed), s 24 – Land Titles Act (Cap 157, 1985 Ed), s 64

This case had been reported in [1988] 2 MLJ 24. After the court had delivered its grounds of decision, counsel for the defendants sought leave to make a further submission on a point of law, which was granted by the court. The defendants' submission was that the statutory power of sale in s 24 of the Conveyancing and Law of Property Act ('the CLP') was not available to the plaintiffs as they did not have a registered mortgage under the LTA.

Held, rejecting the defendants' further argument:

(1) The incorporation by reference of Part IV of the CLP as part of the LTA does not imply that the provisions of Part IV are inconsistent with the LTA; nor does such incorporation affect its separate existence as a statute of general application except to the extent that it is inconsistent with the LTA in regard to registered land.

(2) Since the LTA has nothing to say in relation to unregistrable mortgages of registered land except that it provides a means of protecting such interests by caveats the question of whether such mortgagees have the statutory powers of mortgagees of non-registered land is left to the general law to determine.

(3) In the court's view, s 24 of the CLP confers on any mortgagee, whose mortgage is made by deed, a statutory power of sale exercisable in the manner provided in s 25. In this case, the defendants' mortgage is made by deed.

Legislation referred to

Conveyancing and Law of Property Act (Cap 61, 1985 Ed) ss 24, 25(b)
Land Titles Act (Cap 157, 1985 Ed) ss 3(1), (3), 55(4), 64

Molly Lim (Ms) for the plaintiffs.
Manjit Singh for the defendants.

Cur Adv Vult